85-914

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, 1985

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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FRANK JURECZKI,
Petitioner,

VS.

CIVIL ACTION

THE CITY OF SEABROOK, TEXAS; CURTIS WHITE, Individually and in his Capacity as Building Inspector of the City of Seabrook, Texas; JUDGE JOE PIRTLE Individually and in his Official Capacity as Municipal Judge for the City of Seabrook, Texas; STEVEN WALTERS, Individually and in his Official Capacity as City Manager of the City of Seabrook, Texas; BILL KERBER in his Official Capacity as Chief of Police of the City of Seabrook, Texas,
Respondents.

By way of a Petition For A Writ of Certiorari to review a final judgment of the United States of Appeals for the Fifth Circuit.

PETITIONER FRANK JURECZKI's PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a City Building Inspector who misleads a citizen into believing that he can build without a building permit and who thereafter maliciously procures an arrest warrant for the citizen's arrest is insulated from liability under 42 U.S.C. §§ 1983 (1982) due to the actions of the Magistrate in issuing the warrant.

2. Whether the district court and the Fifth Circuit violated Petitioner's Seventh Amendment right to trial by jury by deciding disputed factual issues.

3. Whether the actions of a City Building Inspector who has been delegated all enforcement responsibilities under the City Building Code constitute a policy or custom for purposes of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
JURISDICTIONAL STATEMENT.	1
CONSTITUTIONAL PROVISIONS RELIED UPON .	2
STATUTORY PROVISION RELIED UPON	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS.	6
ARGUMENTS	12
I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE INSULATES AN OFFICER WHO MALICIOUSLY PROCURES AN ARREST WARRANT BY PRESENTING HIGHLY MISLEADING AND INACCURATE FACTS BEFORE THE MAGISTRATE FROM LIABILITY UNDER THE FEDERAL CIVIL RIGHTS ACTS SINCE IT DENIES PETITIONER A FEDERAL REMEDY AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER UNITED STATES CIRCUIT COURTS OF APPEALS.	12

Page

II. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT PETITIONER A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT PETITIONER WAS NOT DEPRIVED OF EQUAL PROTECTION OF LAWS BECAUSE ITS DECISION UNCONSTITUTIONALLY INVADED THE PROVINCE OF THE JURY AND THUS DEPRIVED THE PETITIONER OF HIS RIGHT TO A TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 22

III. IF THE SUPREME COURT OF THE UNITED STATES GRANTS A WRIT OF CERTIORARI, IT SHOULD ALSO GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ACTS AND EDICTS OF A CITY BUILDING OFFICIAL WHO IS THE ULTIMATE REPOSITORY OF CITY POWER DOES NOT CONSTITUTE A CUSTOM OR POLICY FOR PURPOSES OF MONELL SINCE IT CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS 28

CONCLUSION. 36

APPENDIX

TABLE OF AUTHORITIES

CASES — PAGE

Ames v. United States, 600 F.2d 183 (8th Cir. 1979)..... 18

Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981)..... 29

Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1981)..... 16

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)..... 32

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc)..... 24,31,32,33

Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983)..... 29, 35

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)..... 12, 26

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982)..... 30

Briggs v. Malley, 748 F.2d 715 (1st Cir. 1984), cert. granted, No. 84-1586 (U.S. May 28, 1985).18,19,20,22

D.C. Wheeler v. Cosden Oil & Chemical Co. 744 F.2d 1131 (5th Cir. 1984)..... 16

Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978)..... 18

PAGE

Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979)..... 23, 24

Familias Unidas v. Brisco, 619 F.2d 391 (5th Cir. 1980)..... 30

Galloway v. United States, 319 U.S. 372 (1943)..... 12, 26

Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982)..... 16

Glicker v. Michigan Liquor Control COMMISSION, 160 F. 2d 96 (6th Cir. 1947)..... 24

Greer v. DeRobertis, 568 F. Supp. 1370 (N.D. Ill. 1983)..... 24

H.C. Blackwell Co. v. Kenworth Truck Co. 620 F.2d 104 (5th Cir. 1980)..... 26

Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982)..... 30

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964)..... 24

Jones v. Lane, 568 F. Supp. 1113 (N.D. Ill. 1983)..... 23, 24

Jureczki v. City of Seabrook, No. 84-2272, slip op. at 4419 (5th Cir. May 20, 1985)..... 14,24,25

Jureczki v. City of Seabrook 668 F.2d 851 (5th Cir. 1982)..... 4

PAGE

Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967)..... 24

McKinely v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983)..... 30, 34

Oklahoma City v. Tuttle, 471 U.S.__, 105 S. Ct.__, 85 L. Ed. 2d 791 (1985)..... 30

Rodriquez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978).... 14, 15

Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2nd Cir. 1983)..... 29,30,34

Ryland v. Shaprio, 708 F.2d 967 (5th Cir. 1983)..... 29

Sisk v. Texas Parks & Wildlife Dept., 644 F.2d 1056 (5th Cir. 1981)... 23

Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982)..... 17, 18

Smith v. Gonzales, 670 F.2d 522 (5th Cir.), cert. denied, 459 U.S. 1137 (1982)..... 14, 16

Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980)..... 23

United States v. Russell, 411 U.S. 423 (1978)..... 21

Williams v. Butler, 746 F.2d 431 (8th Cir. 1984)..... 33, 34

PAGE

Williams v. Lane, 548 F. Supp. 927 (N.D. Ill. 1982)..... 24

Wilson v. Garcia, 53 V.S.L.W. 4481 (U.S. Apr. 17, 1985)..... 21

Wright v. Cuyler, 517 F. Supp. 637 (E.D. Pa. 1981)..... 23, 24

U.S. Constitution

U.S. CONST. amend. IV..... 2

U.S. CONST. amend. VII..... 2, 25

U.S. CONST. amend. XIV..... 2, 22

Statutes

28 U.S.C. §§ 1254 (1) (1982)..... 1

28 U.S.C. §§ 1291 (1982)..... 5

28 U.S.C. §§ 1331 (1982)..... 5

28 U.S.C. §§ 1343 (3) (1982)..... 5

28 U.S.C. §§ 1343 (4) (1982)..... 5

42 U.S.C. §§ 1983 (1982)..... 3,4,5

PAGE

Rules

Fed. R. Civ. P. 50 (a)..... 12

Fed. R. Civ. P. 56..... 4

Sup. Ct. R. 17.1 (a)..... 22,28,35

Sup. Ct. R. 17.1 (c)..... 28

Sup. Ct. R. 20.1..... 1

Sup. Ct. R. 20.4..... 1

Other Authorities

R. Freilich & R. Carlisle, Sword & Shield, 435 (9183)..... 34

JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to Supreme Court Rule 20.1 & 20.4 as well as 28 U.S.C. § 1254 (1) (1982), in that the dismissal of Petitioner's action was affirmed by the United States Court of Appeals for the Fifth Circuit on May 20, 1985. Thereafter, on June 3, 1985, Petitioner filed a Petition For Rehearing En Banc. On June 17, 1985, this Petition was denied by the Fifth Circuit. According to Rule 20.4 of this Court the filing of this Petition tolled the time in which to file the present Petition. Petitioner now duly files his Petition For A Writ of Certiorari.

CONSTITUTIONAL PROVISIONS RELIED UPON

U.S. CONST. amend IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV $\frac{s}{s}$ 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION RELIED UPON

42 U.S.C. §§ 1983 (1982)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On August 4, 1980, Petitioner FRANK JURECZKI, brought this action against the CITY OF SEABROOK, TEXAS, as well as various other municipal officers seeking equitable relief and monetary damages for violation of his fourteenth amendment rights. 42 U.S.C. §§ 1983 (1982). On August 26, 1980, the district court granted the various Defendant's Motion to Dismiss. The Fifth Circuit reversed that decision on February 26, 1982. Jureczki v. City of Seabrook, Texas, 668 F.2d 851 (5th Cir. 1982). In late 1982 and early 1983, cross-motions for summary judgment and responses thereto were filed. Fed. R. Civ. P. 56. Prior to trial, these motions were apparently denied by the district court. Trial was held before a jury on April 18-22, 1983. After the Petitioner had completed his case-in-chief on April 22, 1983, the district court granted the Defendant's Motion for a Directed Verdict.

On April 10, 1984, the district court entered final judgment and filed an accompanying Memorandum and Order. On May 9, 1984, Petitioner duly filed a Notice of Appeal with the Fifth Circuit. Defendant's cross-appealed on May 21, 1984. Jurisdiction in the district court was predicated upon 42 U.S.C. § 1983 (1982) as well as 28 U.S.C. §§ 1331 & 1343 (3) & (4) (1982). Additionally, jurisdiction in the Court of Appeals was predicated upon 28 U.S.C. § 1291 (1982). On May 20, 1985, the decision of the district court was affirmed by the Fifth Circuit. A timely Motion For Rehearing En Banc was filed by the Petitioner. The Fifth Circuit denied this Motion on June 17, 1985.

STATEMENT OF FACTS

In June, 1977, Petitioner, Frank Jureczki, moved to the City of Seabrook, Texas. (A22, 23). In April, 1978, he opened up a fast food resturant called "The Shrimp Hut." (A24, 25). The City had in effect at this time a comprehensive zoning ordinance. (A26, 27, 28, 29). This Ordinance incorporated by reference the Southern Standard Building Code. (A30, 31, 32). The City Ordinance provided for penalties upon violation ranging from $2.00 - $200.00. In enacting the law, the City Council specifically entrusted all enforcement responsibilities to the "City Building Official... or his duly authorized representative." (A31). Since the City did not have a Building Official, Curtis White, the Building Inspector, was the person charged with the interpretation, enforcement and administration of the Building Code. (A33-36). Under the Southern Standard Building Code itself, as adopted by the City of

Seabrook, a building permit must ordinarily be obtained prior to most construction. (A32). This requirement, however, apparently does not apply to temporary structures. (A32, 37-38).

Between the time when he first opened The Shrimp Hut and 1980, Petitioner made numerous improvements on his property. (A39-40). In each instance save one, Petitioner always obtained a building permit. (Id.) The lone exception occurred through a misunderstanding by Petitioner's son while Petitioner was out of town. (A41-42). Upon his return, Petitioner was told of the error and promptly secured a permit. (A43-46).

In June, 1980, Petitioner wanted to build a sun barrier over a gravel area containing picnic benches on his property. Desiring to know whether a permit would be necessary in light of the ambiguity of the Building Code's application to temporary structures, Petitioner called White on June 23, 1980, and asked him to come over to The Shrimp Hut so that he could visually explain his

proposed expansion. (A47-50). Upon White's arrival, Petitioner explained:

1. That under his lease with Houston Lighting & Power, he could not erect a permanent structure (A48-51);
2. What he wanted to build and how he intended to build it (A52); and
3. That the building would not be attached to the ground and that the roof would be thatched (A-52).

After explaining everything to White, Petitioner then inquired as to whether he would need a building permit as Petitioner had often inquired about other zoning matters in the past. (A37, 53-54). Although White disputes having made this statement, his answer was an unequivocal "No". (A37,38,50,55). This statement was overheard by at least three other individuals. (A38, 50,55).

Petitioner then proceeded to build the structure. White apparently first noticed the

structure on Petitioner's property on July 14, 1980. (A56). Although it was White's custom to notify owners of potentially offending structures either orally, in writing or by red tagging the structure itself prior to initiating any complaint, (A57-61), White never even attempted to contact the Petitioner. (A62). Nonetheless, White issued a criminal complaint against the Petitioner for failure to obtain a building permit. (A33, 63-64). This complaint was filed notwithstanding the fact that White told Petitioner no permit was necessary and Petitioner's justifiable reliance thereon. (A65). The Municipal Judge stated that he only considered the sworn complaint in issuing the arrest warrant and that had he known that White had told the Petitioner no permit was necessary, he would not have issued the arrest warrant for lack of probable cause. (A66-67). Petitioner was arrested the next morning for building without a permit (A68-69).

Being angry and upset as well as extremely fearful a future arrest, Petitioner sought out White at the latter's office immediately upon his release from custody. (A70-74). White told the Petitioner at this meeting that he "(w)ouldn't be arrested again if he went and got a building permit." (A74). On July 25, a building permit was finally issued to the Petitioner after numerous attempts to obtain one from White. (A75). Upon issuance of the permit, it became clear to Petitioner that he would have to move the already constructed building, anchor it to make it a permanent structure and remove the thatching from the roof. (A76). White fully expected Petitioner to use the already constructed building (A77-80), and made it clear to Petitioner that he could use the structure. (A81). White also knew that Petitioner needed to do certain electrical work prior to moving the building. (A82). The permit itself did not indicate by what date the building

had to be moved, (A80, 83), nor did White indicate any deadline to the Petitioner. (A84). Thereafter, on July 30, 1980, Mr. Carl Newton applied for an electrical permit for The Shrimp Hut. (A85). White knew of this application at the time that it was filed. (A86).

During the period between Petitioner's initial arrest and Mr. Newton's application, White maliciously attempted to have Houston Lighting & Power cancel Petitioner's lease. (A87-88). Apparently failing in that effort, White swore out on July 31, another criminal complaint against Petitioner knowing full well that it could easily result in another arrest. (A89). The basis of this complaint was failure to obtain a building permit. (A90). This complaint was lodged even though White had approved the building permit for Petitioner some six days earlier. (A75). At approximately 8:30 P.M. on July 31, Petitioner was arrested at his place of business in front

of a large number of customers. (A91-94). Appellant was ultimately tried and convicted in Seabrook Municipal Court for building code violations. Upon appeal to the Harris County Criminal Court of Law, the charges against the Petitioner were dismissed. To this day he remains the only person in the City of Seabrook's history to ever be arrested for a building code. (A96-97)

ARGUMENT

I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE INSULATES AN OFFICER WHO MALICIOUSLY PROCURES AN ARREST WARRANT BY PRESENTING HIGHLY MISLEADING AND INACCURATE FACTS BEFORE THE MAGISTRATE FROM LIABILITY UNDER THE FEDERAL CIVIL RIGHTS ACTS SINCE IT DENIES PETITIONER A FEDERAL REMEDY AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER UNITED STATES CIRCUIT COURTS OF APPEALS.

This case comes to this Court on a Motion for a Directed Verdict. Fed. R. Civ. P. 50 (a). As such, all inferences and facts must be resolved in favor of the Petitioner. Galloway v. United States, 319 U.S. 372 (1943); Boeing Co. v.

Shipman, 411 F.2d 365,374-75 (5th Cir. 1969) (en banc). This Court, therefore, must assume that Petitioner actively sought the advise of White, the only City Building Official. (A47-52). This Court must also assume that Petitioner fully described the structure that he wanted to build, (Id.), and that he was told that no permit was necessary in order to build. (A37,38,50,55). The Court must assume that Petitioner relied on White's opinion and that White maliciously swore out a Complaint for Petitioner's arrest even though he told him no permit was necessary. (A2-6). Finally, this Court must draw the factual inference that the Judge would not have issued the arrest warrant had he been told by White that White had told Petitioner that no building permit was necessary. (A66-67). Nonetheless, the Fifth Circuit ruled that White's malice in obtaining the warrant was not actionable because "(a) Judge's determination of probable cause

breaks the chain of causation and insulates the initiating party from liability." Jureczki v. City of Seabrook, No. 84-2272, slip op. at 4422 (5th Cir. May 20, 1985) (citing Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir.), cert. denied, 459 U.S. 1137 (1982)). A review of Fifth Circuit law as well as law from all of the other Circuits to decide this issue reveals that this theory is erroneous and should not insulate the malicious and/or possibly negligent acts of the officer who procures the warrant.

Decisions in the Fifth Circuit concerning wrongful procurement of a warrant stem from a fundamental misunderstanding of that Court's en banc decision in Rodriquez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978). In Rodriquez, through numerous errors the plaintiff was arrested and indicted. There was no evidence of malice on the part of the officers and the evidence showed,

at best, that only negligence was involved. Judge Tjoflat speaking for six members of that Court held that there could be no wrongful action because the Grand Jury's indictment created a conclusive presumption of probable cause. Id. at 1191. Judge Hill speaking for himself and another concurring judge held that such presumptions would be inapplicable where the officer acted with malice and bad faith in procuring the indictment. Id. at 1195. The six dissenting judges, held that an officer could be liable for wrongful procurement of an indictment if his conduct was not within the bounds of reason. Id. at 1207. As such, eight out of the fourteen judges held that an intermediary's decision as to probable cause does not insulate the procuring officer from civil liability. Nonetheless, this decision has been transmutted into virtually inflexible rule to the effect that no matter how inflammatory the facts that are placed before

the intermediary, his decision is conclusive on probable cause and cuts off causation. D.C. Wheeler v. Cosden Oil & Chemical Co., 744 F.2d 1131 (5th Cir. 1984); Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir.), cert. denied, 459 U.S. 1137 (1982). The reason that the word "virtually" is utilized is that Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979), comes to a totally contrary conclusion. In that case, a deputy obtained a search warrant which he either knew or should have known was based on informants who may have had a personal grudge. Despite the fact that a search warrant was issued, this Court affirmed the deputy's liability for in part illegally procuring the search warrant. Additionally, in Garris v. Rowland, 678 F. 2d 1264 (5th Cir.), cert. denied, 459 U.S. 864 (1982), liability was upheld against a municipality where it was found that the affidavit utilized to support an arrest warrant contained false statements. Id. at 1270-71.

Besides being in a state of disarray, the "chain of causation" theory in Smith and its progeny cannot withstand scrutiny. In causation one utilizes the "but for" concept. Utilizing this tort concept to determine when a causal connection is present makes it clear that "but for" a police officer's submission of the warrant to the Magistrate, the warrant would not issue and the search or arrest would not occur. It is the decision of the police officer to bring the matter to the Magistrate that is the active cause of the search or arrest. Where that decision is a result of malice or negligence, that malice or negligence is the cause of the improper search or arrest.

The Fifth Circuit's decisions in Smith and D.C. Wheeler are in conflict with the decisions of four other Circuits. In Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981), cert denied, 459 U.S. 829 (1982), the Ninth Circuit determined

that an intermediary's independent decision breaks the causal chain and insulates the arresting officer from future liability if, but only if, the officer does not color the intermediary's independent judgment by, for example, exerting pressure or presenting false evidence. Id. at 266-67. In Dellums v. Powell, 556 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978) the District of Columbia Circuit indicated that pressure, undue influence, or knowing misstatements by the police could rebut the presumption of independent judgment by the United States Attorney and extend the "chain of causation." Id. at 192-93. Likewise, the Eighth Circuit in Ames v. United States, 600 F.2d 183 (8th Cir. 1979), stated that "presentation of false evidence or the withholding of evidence" might preclude an immunization of officers from tort liability. Id. at 185. The most recent Circuit Court of Appeals to reject the Fifth Circuit's position is the First Circuit in the case of Briggs v. Malley,

748 F.2d 715 (1st Cir. 1984), cert. granted, No. 84-1586 (U.S. May 28, 1985). In Briggs the First Circuit held that judicial approval of an arrest warrant could not serve as an absolute bar to civil rights liability of the officer who obtained the warrant. Id. at 721. Certiorari was recently granted in that case so that this Court could finally decide this issue.

Allowing the Fifth Circuit's position to stand makes little policy sense in this case. Unlike cases which suggest imposing personal liability might "chill" law enforcement officers from seeking arrest and/or search warrants, no court should countenance lying and/or delibrate misleading of a Magistrate. After all, law enforcement agents have a duty to fight crime without violating the law. As stated by the Court in Briggs v. Malley,

> If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea

> of a rule of law. The exercise of police power within the law is the very foundation of the social contract.

supra at 719 - 20, (emphasis added). The same court also pointed out that:

> The danger in making the Magistrate the sole protector of the fourth amendment, however, is twofold. It encourages sloppy police work and it enlarges the margin of error leading to unconstitutional invasions of our persons and homes. Unfortunately, not all magistrates subject the affidavit to the scrutiny required by the fourth amendment.

supra at 720. This latter observation came to pass in the present case in that the Judge only considered the "bare-bones" affidavit. The Judge also stated that had he known that White had told the Petitioner that no permit was necessary, he would not have issued the arrest warrant for lack of probable cause.

The facts of this case overwhelmingly cry out for resolution by this Court. Petitioner attempted to obey the law by affirmatively seeking the building inspector's advice. The situation presented by this case is not one where a

reasonable person would necessarily know how to conform his conduct to the law particularly since the Building Code was ambiguous regarding temporary structures. Petitioner unquestionable relied on White's opinion. In such a situation, White's conduct in maliciously misleading the Judge is so outrageous that due process principles are violated. See United States v. Russell, 411 U.S. 423, 431-32 (1973). The arrest flowing therefrom must also necessarily be illegal and unconstitutional. As this Court has pointed out the high and lofty purposes of 42 U.S.C. §§ 1983 (1982) make it appropriate to accord the statute a sweep as broad as its language. Wilson v. Garcia 53 U.S.L.W. 4481, 4484 (U.S. April 17, 1985). Any construction of the law which would permit the interposition of the magistrate between the police officer and the warrant to immunize the officer's conduct would not serve the lofty goals of Section 1983 and would leave plaintiffs

remediless. Such a construction of the statute is to be avoided. See Briggs v. Malley, supra at 720. The Fifth Circuit's position brings about such a result. Since a huge split in the circuits already exists and this Court has already granted certiorari in Briggs, this Court should grant Petitioner a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals. See Sup. Ct. R. 17.1 (a).

II. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT PETITIONER A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT PETITIONER WAS NOT DEPRIVED OF EQUAL PROTECTION OF LAWS BECAUSE ITS DECISION UNCONSTITUTIONALLY INVADED THE PROVINCE OF THE JURY AND THUS DEPRIVED THE PETITIONER OF HIS RIGHT TO A TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Under the fourteenth amendment to the United States Constitution, a person is guaranteed "equal protection of the laws." U.S. CONST amend. XIV. In order to prove an equal protection claim, a plaintiff need not show discrimination against a

protected class or the infringement of a fundamental right. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979); Jones v. Lane, 568 F. Supp. 1113, 1116 (N.D. Ill. 1983); Wright v. Cuyler, 517 F. Supp. 637, 643 (E.D. Pa. 1981). As such, the Fifth Circuit has held that a constitutional claim was stated where a plaintiff alleged that he was deprived of equal protection because the State of Texas treated "commercial" fishermen differently than "sport" fishermen. Sisk v. Texas Parks & Wildlife Department, 644 F.2d 1056 (5th Cir. 1981). Rather, it is sufficient for a plaintiff to show that he was subject to a purposeful distinction and thereby treated in a different manner from other people. See, e.g., Stringer v. Rowe, 616 F.2d 993, 998

(7th Cir. 1980); Durso v. Rowe, supra at 1372; Mansell v. Saunders, 372 F.2d 573, 574-76 (5th Cir. 1967); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964); Glicker v. Michigan Liquor Control Commission, 160 F.2d 96,99 (6th Cir. 1947); Greer v. DeRobertis, 568 F. Supp. 1370, 1374-75 (N.D. Ill. 1983); Williams v. Lane, 548 F. Supp. 927, 931-32 (N.D. Ill. 1982); Jones v. Lane, supra at 1116; Wright v. Cuyler, supra at 643.

In its opinion, the Fifth Circuit reaffirmed that unequal application of a facially valid building regulation can result in the deprivation of equal protection of laws. Jureczki v. City of Seabrook, Texas, No. 84-2272, slip op. at 4422 (5th Cir. May 20, 1985); see Bennett v. City of Slidell,728 F.2d 762 (5th Cir. 1984) (en banc). The panel then stated that its own review of the evidence

convinced it that Petitioner was not subjected to disparate treatment because:

(1) The district judge found that White had attempted to contact him;

(2) White therefore attempted to follow his usual custom of notifying alleged violators; and

(3) Petitioner could not construct a Constitutional violation due to his own unavailability. Jureczki v. City of Seabrook, Texas, supra at 4422.

The Seventh Amendment to the United States Constitution guarantees that "(i)n suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved...." U.S. CONST. amend. VII. The Constitution thus requires that "the jury

be allowed to make reasonable inferences from the facts proven as evidence...." Galloway v. United States, 319 U.S. 372, 396 (1943). While a court does have the power to direct a verdict, if reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion must be denied and the case submitted to the jury. See Boeing Co. v. Shipman, 411 F.2d at 374-75. The standard for reviewing the propriety of a directed verdict in any appellate court, including this Court, is the same as the test that must be utilized by the district court. H.C. Blackwell Co. v. Kenworth Truck Co., 620 F.2d 104 (5th Cir. 1980).

The Fifth Circuit's decision that White attempted to contact Petitioner and that Petitioner could not construct a Constitutional violation out of his own

unavailability violates Petitioner's right to trial by jury. According to White, he first saw the "offending" structure on Monday, July 14 and did not try to contact Petitioner because it was obvious that no one was home. (A56). On Tuesday, July 15, White testified that he tried to call Petitioner at The Shrimp Hut but no one answered the phone because the restaurant was closed. (A98). On Wednesday, July 16, White testified that he went by the restaurant but "didn't see anybody". (A33). Doubt was cast upon White's testimony by the testimony of Nancy Jureczki. Mrs. Jureczki stated that The Shrimp Hut opens at 8:00 a.m. and stays open as late as 10:00 p.m. (A99-100). She further stated that the business is always open every day of the week except Monday and that either she

or an employee are always in the restaurant during its hours of operation. (Id.). A reasonable jury could, therefore, conclude that White never attempted to contact Petitioner and, as such, violated his right to equal protection of laws. By substituting its judgment for that of the jury, both the Fifth Circuit and the district court violated Petitioner's Seventh Amendment right to trial by jury. Rendering a decision so far in contravention to applicable precedent requires this Court's guidance. Sup. Ct. R. 17.1 (a) & (c). As such, this Court should grant Petitioner a Writ of Certiorari to review the judgment of the Fifth Circuit.

III. IF THE SUPREME COURT OF THE UNITED STATES GRANTS A WRIT OF CERTIORARI, IT SHOULD ALSO GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ACTS AND EDICTS

OF A CITY BUILDING OFFICIAL WHO IS THE ULTIMATE REPOSITORY OF CITY POWER DOES NOT CONSTITUTE A CUSTOM OR POLICY FOR PURPOSES OF MONELL SINCE IT CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

During the trial of this case, Petitioner attempted to impute White's acts to the City of Seabrook. Under the law, a single unlawful act, if performed by someone whose edicts or acts may fairly be said to represent official policy would support an action against a municipality. See Rookard v. Health and Hospitals Corp., 710 F.2d 41,45 (2d Cir. 1983); Ryland v. Shapiro, 708 F.2d 1110, 1117 (9th Cir. 1983); Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983); Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981). Where an official has final authority over significant matters involving the exercise of discretion, the choices

represented official policy. Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982). An official has final authority for purposes of municipal liability if his decisions, at the time they were made, for practical or legal reasons constituted the municipality's final decision. Rookard v. Health and Hospitals Corp., supra at 45; McKinley v. City of Eloy, supra at 1116; Hearn v. City of Gainesville, 688 F.2d 1328 at 1334 (11th Cir. 1982); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980). Unquestionably, Appellee White was the ultimate repository of City power as he was the sole person charged with interpreting and enforcing the Building Code. (A31,33-36). The recent dicision of this Court in Oklahoma City v. Tuttle, 471 U.S.__, 105 S. Ct.__, 85L Ed. 2d 791

(1985), is not to the contrary. In the Tuttle case, this Court held that a single act of excessive force could not be a city custom or policy for Section 1983 liability. This case is distinguishable for a number of reasons. First, in that case there was no claim that the policeman who committed the civil rights violation was the ultimate repository of city power. Second, there are two unconstitutional acts in this case and not one. Third, unlike the Tuttle case where the policy was nebulous and had to be established, the action of an ultimate repository is the policy of the municipality itself.

Recently, the Fifth Circuit has decided the case of Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc). In Slidell, the Fifth Circuit held that culpable policy is attributable

to the governing body of a city where the policy was made by an official to whom the governing body has given "policy-making authority. Id. at 769. To be a "policy-making official" the governing body "must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility...." Id. The Seventh Circuit has rendered a similar interpretation of Monell. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). In his dissenting opinion to Slidell, Judge Politz correctly pointed out that:

> In essence, the majority holds that any action by an appointed official that is inconsistent with the City's written ordinance is an aberrant act attributable only to that official and, therefore, that such action can never constitute official policy within the meaning of Monell. This

> restrictive interpretation effectively negates the possibility that municipal liability will ever be imposed for the unconstitutional actions of an appointed official. Indeed, under the contours defined by the majority, the instances in which an edict or act of any person not a "lawmaker" may "fairly be said to represent official policy" will seldom arise. That result is totally at odds with Monell's mandate that municipalities be subjected to § 1983 liability for more than the mere written words of their ordinances.

Id. at 771 (Politz, J. dissenting).

Seizing on Judge Politz's observations, the Eighth Circuit has rendered a contrary interpretation of Monell in the case of Williams v. Butler, 746 F.2d 431 (8th Cir. 1984). In that case, the Eighth Circuit held that where there is no internal procedure of redress for the victim of an unconstitutional act because an official has been delgated final authority on a decision, the responsibility for which primarily lies

with the City, a local governing body must be held responsible for the acts of its officials. Id. at 438; See generally, R. Freilich & R. Carlisle, Sword & Shield, 435-37, 461-65 (1983). Thus, the Eighth Circuit held that:

> (1) If, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and
>
> (2) If a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body.

Williams v. Butler, supra at 438. Cases from at least three other circuits arrive at a similar conclusion. See Rookard v. Health and Hospitals Corp., 710 F.2d 41, (2nd Cir. 1983); McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983);

Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983).

In the present case, the Fifth Circuit did not reach the question of whether White was the ultimate repository of City power. Nonetheless, it is clear from the en banc decision in Slidell that the Fifth Circuit would not impose municipal liability in that the defendant in Slidell held the same position as White did in this case. The precedents of the Fifth Circuit are in conflict with the precedents of at least three other circuits. Following the Fifth Circuit's interpretation unduly restricts the scope of municipal liability and will effectively cut off many plaintiffs in civil rights cases. Since a split in the circuits does exist, this Court should grant Petitioner a writ of certiorari to review this pressing issue. Sup. Ct. R. 17.1 (a).

CONCLUSION

The Supreme Court of the United States should grant the Petitioner a writ of certiorari to review all of the issues raised herein and, upon review, reverse the judgment of the Fifth Circuit Court of Appeals and remand this matter for a new trial.

Respectfully submitted,

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A MEMBER OF THE BAR OF
THE SUPREME COURT OF
THE UNITED STATES.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-2272

FRANK JURECZKI

Plaintiff-Appellant
Cross-Appellee,

versus

THE CITY OF SEABROOK, TEXAS, ET AL.,
Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 20, 1985, 5 Cir., 198___, _____F.2d_____)

(June 17, 1985)

Before WISDOM, WILLIAMS and HILL, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.S. Williams
United States Circuit Judge

FRANK JURECZKI, Plaintiff-Appellant,
Cross-Appellee,

v.

The CITY OF SEABROOK, TEXAS, et al, Defendants-Appellees,
Cross-Appellants,

No. 84-2272

United States Court of Appeals,
Fifth Circuit.

May 20, 1985.

Appeals from the United States District Court for the Southern District of Texas.

Before WISDOM, WILLIAMS, and HILL, Circuit Judges.

WISDOM, Circuit Judge:

Frank Jureczki was arrested twice in two weeks for three violations of the City of Seabrook's Comprehensive Zoning Ordinance after he constructed a flammable, thatched roof sun barrier adjacent to his restaurant without first obtaining a building permit for new construction.

On August 4, 1980, he brought an action for equitable relief and monetary damages under 42 U.S.C. § 1983 (1982), the Fourteenth Amendment of the U.S. Constitution, and the Constitution of the State of Texas. Jureczki sought such relief against the City of Seabrook, Texas; Bill Kerber, the Chief of Police; Curtis White, the City Building Inspector; and Steven Walters, the City Manager. In his complaint the plaintiff contended that he was denied due process because he was not notified of the violation and was not given a reasonable time to comply before he was arrested and subjected to criminal proceedings.

After the first arrest, Jureczki applied for and was granted a permit with instructions to move the building, add a rafter, and replace the thatched canopy with a corrugated tin roof. Six days after the permit was granted, Jureczki was arrested again for failure to correct past violations, brought to jail, booked, photographed, and fingerprinted. On appeal, in the trial

de novo in Harris County court, all three cases were dismissed on the prosecutor's motion, on the ground that "No written notice of violation, or instructions to provide for compliance, were given plaintiff as required by the City ordinance alleged in its inclusion of Standard Building Code 1976 Edition, was given".

The district court dismissed Jureczki's complaint. We reversed and remanded to the district court with instructions to conduct a hearing on the defendants' motion to dismiss and on the issue of damages should there be a trial on the merits. Jureczki v. City of Seabrook, 5 Cir. 1982, 668 F.2d 851. Jureczki amended his complaint to add an equal protection claim based on selective enforcement of Seabrook's building code. The district court conducted a trial before a jury on the merits and directed a verdict for the defendants at the close of trial. On appeal, Jureczki makes three main contentions.

First, he argues that the alleged malice of the building inspector, White, caused White to file an inaccurate and incomplete complaint, which resulted in Jureczki's arrest and violated his due process rights. Second, Jureczki argues that White's failure to observe his alleged custom of first issuing warnings to violators of the Standard Building Code constitutes a violation of equal protection rights. Finally, Jureczki contends that the district court erred in holding that the Standard Building Code does not require notice to violators before their arrest. We find no reversible error and accordingly affirm.

I. DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW

(1) Jureczki contends that his Fourth Amendment rights were violated when White placed "incomplete, inaccurate and highly prejudicial information" before the Texas judge who issued the arrest warrant for Jureczki. Jureczki argues that White's improprieties in the procurement of

the arrest warrant as opposed to mere reliance on an existing order, places the defendants outside the immunity of Baker v. McCollan, 1979, 443 U.S. 137, 99 S. Ct. 2689, 61 L.Ed.2d 433. In that case, the Supreme Court held that a sheriff could not be liable under section 1983 for acts or omissions in reliance on a facially valid court order. Id. at 145-46, 99 S.Ct. at 2695, 61 L.Ed. 2d at 442-43.

The argument has some legal foundation. This Court, for example, has held defendants liable under section 1983 for improper conduct in the procurement of a search warrant. Baskin v. Parker, 5 Cir.1979, 602 F.2d 1205. More recently, the Seventh Circuit expressly declined to apply Baker's grant of immunity to an officer in the procurement of a warrant. In Whitley v. Seibel, 7 Cir.1980, 613 F.2d 682, cert denied, 1982, 459 U.S. 942, 103 S.Ct. 254, 74 L.Ed2d 198, the Court held:

> "It appears from the testimony that had that assistant state's attorney been fully and honestly briefed by the defendant and had not been misled, it is very doubtful that the arrest would have been authorized.... We do not believe that kind of behavior by an officer to accomplish an arrest may be excused by the Baker holding... Although some of the defendant's acts of omission may have been only negligent, there is a strong suggestion of intentional and concealed corner-cutting to accomplish the arrest."

Id. at 686. The Tenth Circuit has also held that Baker's proscription does not apply to arrests occasioned by a police officer's false statements to other law enforcement officials, McKay v. Hammock, 10th Cir.1984, 730 F.2d 1367, 1374. Our own Court has upheld an award of damages against a municipality after an officer negligently prepared an affidavit for the plaintiffs' arrest. Garris v. Rowland, 5th Cir.1982, 678 F.2d 1264, cert. denied, 1982, 459 U.S. 864, 103 S.Ct. 143, 74 L.Ed.2d 121.

In each of these cases, however, the state had to concede that the search or seizure was

undertaken without probable cause. In Baskin, the affidavit for the search warrant was based on information that police knew or should have known was prejudiced and unreliable, 602 F.2d at 1207; in Whitley, the police officer failed to disclose certain facts that eliminated any probable cause, 613 F.2d at 686; in McKay, the plaintiff was arrested in violation of the assurances of safe-conduct in his bond, 730 F.2d at 1372; and in Garris, the affidavit for the arrest warrant contained false statements and the jury found that there was not probable cause for his arrest, 678 F.2d at 1270-71.

In the instant case, by contrast, we find no such failings in the affidavits or in the arrests. It is undisputed that Jureczki had violated Ordinance No. 78-12 of the Southern Standard Building Code. Jureczki concedes, as he must, that the complaint filed by White was therefore valid in alleging a violation of Ordinance No. 78-12. He points to no omissions

or misstatements that, if corrected, would eliminate probable cause. It is also beyond contention that Judge Pirtle was within the law in issuing either an arrest warrant or a summons upon the filing of a criminal complaint. Tex. Crim.Proc.Code Ann §§ 2.09, 15.03 (Vernon 1977 & Supp.1985).

Jureczki argues on appeal that the arrest warrant was not valid because in filing the complaint before Judge Pirtle, White was acting maliciously. White's malice, which we may assume for purposes of this appeal from an adverse directed verdict, is irrelevant in obtaining a warrant where probable cause exists. A judge's determination of probable cause breaks the chain of causation and insulates the initiating party from liability. Smith v. Gonzales, 5th Cir.1982, 670 F.2d 522, 526, cert. denied, 1982, 459 U.S. 1137, 103 S.Ct. 772, 74 L.Ed.2d 984. This Court held in Gonzales that even if the officer seeking the warrant has acted

maliciously in procuring these warrants, and even if that action results in false arrest, an intermediary's decision to issue a warrant insulates the malicious action from liability. Id. If there exists probable cause at the time, the arrest is constitutional. The evil intent or bad faith of an officer in obtaining or executing a valid warrant cannot transmute an arrest made with probable cause into a section 1983 violation, just as an officer's good intent is irrelevant when he contravenes settled law.

II. ALLEGED VIOLATIONS OF EQUAL PROTECTION

Jureczki argues that he has been subjected to a violation of the equal protection clause because White allegedly failed to follow his alleged custom of first warning a violator of the possibility of summons or arrest and then allowing the violator to correct the deficiencies. Jureczki contends that he was not accorded the benefit of these gentler preliminaries but was

instead summarily arrested for his violations. He further contends that he is the first person in Seabrook to have been arrested for building code violations. In his brief Jureczki urges this Court to find a violation of his equal protection rights, because "he was subject to a purposeful distinction and thereby treated in a different manner from other people".

(2,3) The district court held that since Judge Pirtle issued the warrant independently of White, and since the warrant was based on probable cause, there was no equal protection violation. Our Court has since held that unequal application of facially valid building regulations can result in equal protection violations. Bennett v. City of Slidell, 5th Cir.1984, 728 F.2d 762. Our own review of the evidence, however, convinces us that there was no disparate treatment. White did in fact attempt to contact Jureczki several times before issuing the complaint. The district court found:

> "White testified that he made several unsuccessful attempts on July 15 and 16, 1980, by phone and personal visit to the Shrimp Hut to contact Jureczki regarding building a structure in violation of Ordinance 78-12."

The first complaint was not filed until July 17. White therefore attempted to follow his custom of notifying violators. The record shows that White had reason to act with dispatch: The thatched roof canopy was flammable and presented a fire hazard to those who sat under it. Jureczki cannot construct a constitutional violation because of his own unavailability. Finally, evidence discloses that Judge Pirtle had just recently come on the bench and had independently decided to issue arrest warrants rather than summons upon receipt of a complaint from the building inspector. Jureczki's misfortune in being the subject of the first complaint that Judge Pirtle received after this completely proper decision similarly does not rise to the level of a constitutional wrong. We affirm the district court's directed

verdict on the equal protection allegations.

III. WRITTEN NOTICE FOR VIOLATIONS OF THE BUILDING CODE

(4,5) The district court carefully considered Jureczki's contention that the building inspector must give notice for any violation of the Code and must provide the person in violation with an opportunity to cure before taking any other action under the Code, such as seeking a summons or a warrant. The judge reviewed not only the sections that Jureczki allegedly violated but also related provisions. He concluded that notice was not necessary for work that was substantially completed. We usually defer to the district judge in matters of local law. See Black v. Fidelity & Guaranty Insurance Underwriters, Inc., 5th Cir. 1978, 582 F.2d 984, 987, holding that "when state decisional law affords no guidance, the interpretation of the district judge, who is well versed in the intricacies and

trends of local law, is entitled to great deference". We find that the district court's analysis of the Standard Building Code is thorough and reasonable, and accordingly affirm its holding that Jureczki was not entitled to notice.

IV. CONCLUSION

Jureczki's allegation that the district court erred in granting the defendants' motion for a directed verdict on the conspiracy count is frivolous. There was no evidence that White and Walters ever conferred with Judge Pirtle, and testimony at trial shows that the conversations between White and Walters concerned only the propriety of filing criminal complaints with the Municipal Court.

We have examined Jureczki's other claims on appeal and similarly find no reversible error.

Jureczki may or may not have been treated unfairly, but five days of trial testimony show that he was denied neither due process nor equal

protection. The complaint was accurate and contained no material omissions. It constituted probable cause for an arrest. Neither the complainant nor the municipal judge violated Jureczki's due process rights. Testimony at trial, read in whatever light, failed to establish a sufficient factual basis of disparate treatment to substantiate an equal protection violation. We agree with the district court's interpretation that Jureczki was not entitled to notice under applicable provisions of the Standard Building Code. The district court's opinion is hereby AFFIRMED with costs of the appeal to be charged to the plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FRANK JURECZKI, Plaintiff, V. CRUTIS WHITE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BUILDING INSPECTOR OF THE CITY OF SEABROOK, TEXAS; JUDGE JOE M. PIRTLE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MUNICIPAL JUDGE FOR THE CITY OF SEABROOK, TEXAS; STEVEN WALTERS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF SEABROOK, TEXAS; BILL KERBER, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CITY OF SEABROOK, TEXAS; JOHN DOES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES FOR THE CITY OF SEABROOK, TEXAS; AND THE CITY OF SEABROOK, TEXAS, Defendants.	CIVIL ACTION NO. H-80-1742 Consolidated with H-82-2000

Thomas J. Petley, Houston, Texas,
Attorney for Plaintiff.

SACCOMANNO, CLEGG, MARTIN & KIPPLE
(Bruce L. James), Houston, Texas,
Attorneys for Defendants.

MEMORANDUM AND ORDER:

Plaintiff, Frank Jureczki, invoking 42 U.S.C. ss 1983 (1976), brought this action seeking damages and injunctive relief from the City of Seabrook, its City Manager Steven Walters, Chief of Police Bill Kerber, former Building Inspector Curtis White and Municipal Judge Joe M. Pirtle, for violations of Plaintiff's constitutional rights through the enforcement of the Seabrook zoning ordinance. The case was tried to the Court and a jury. Upon Defendants' motion for directed verdict, the Court reviewed the evidence adduced at trial, drawing all reasonable inferences in a light most favorable to Plaintiff concluded that reasonable men and women in the exercise of impartial judgment could not arrive at contrary results. Accordingly, the Motion For Directed Verdict was granted. Boeing Company v. Shipman, 411 F.2d 365, 375 n. 16 (5th Cir. 1969).

The City of Seabrook, Texas ("Seabrook") is a home-rule city located principally within Harris County, Texas. Curtis White ("White") served as the Building Inspector for Seabrook

from July 19, 1977, until his retirement on September 3, 1981. Bill Kerber ("Kerber") has been the Chief of Police for Seabrook since February 16, 1979.

Plaintiff, Frank Jureczki ("Jureczki") is a full time shrimper and the proprietor and sole owner of a restaurant known as the Shrimp Hut, which is located at 1818 NASA Road in Seabrook. In early June, 1980, Jureczki decided to expand his restaurant by adding a sun barrier over approximately 10 outdoor picnic tables which were placed adjacent to the building on a graded area. On the morning of June 25, 1980, Jureczki called White and asked him to come over to the Shrimp Hut that afternoon. White obliged. Jureczki testified that at the Shrimp Hut he discussed a myriad of possible structures such as beach type umbrellas, a sun barrier or canopy top to provide shade over a few picnic tables from the summer sun. White disputed the building description testifying, as set forth in the

margin, that Jureczki never specified the details of the structure he intended to build. White testified only that it was his understanding that it had to be a portable structure. White further testified that he told Jureczki that he would need a building permit.

The sun barrier was erected over the weekend of July 12 and 13, 1980, by Jureczki and his son. The structure was approximately 36 feet long by 24 feet wide and was supported by approximately ten 7 inch by 10 inch creosote pilings and had a thatched roof. White did not discover the sun barrier until after he came to work on Monday, July 14, 1980, when he observed that the thatched roof structure was substantially in place and noted that a building permit had not been issued for the structure, which was a violation of the City of Seabrook Comprehensive Zoning Ordinance No. 78-12 ("the Ordinance or Ordinance 78-12"). See Plaintiff's Exhibits 10A-D.

White testified that he made several

unsuccessful attempts on July 15 and 16, 1980, by phone and personal visit to the Shrimp Hut to contact Jureczki regarding building a structure in violation of Ordinance 78-12.

On or about July 17, 1982, White filed two complaints, one for July 16, 1980, and one for July 17, 1980, against Jureczki for violating Ordinance 78-12 in failing to obtain a building permit prior to construction. White met with Walters on July 17, 1980, and discussed with him the filing of the two complaints against Jureczki. Walters concurred in the decision to file the complaints with Judge Pirtle. On July 17, 1980, Judge Pirtle signed two warrants of arrest for Complaint Nos. 80-1338 and 80-1339, and those warrants were delivered to the Seabrook Police Department on July 18, 1980. On July 18, Officer Gary Webb served the two arrest warrants on Jureczki at his residence in Seabrook. Officer Webb knocked on Jureczki's door and did not forcibly enter Jureczki's home. After identifying

Jureczki, Officer Webb announced that he was being placed under arrest pursuant to the arrest warrants. Jureczki's wife was allowed to get Jureczki a pair of shoes and a shirt to complete his dressing and the police did not perform any type of search of his person or home. Jureczki was not handcuffed and no guns or pistols were drawn by the police officers. In fact, Jureczki was allowed to drive his own car to the police station and no police officer rode with him in his car. Jureczki estimates that his entire time at the police station was approximately ten minutes before the bond was posted. Jureczki was not placed in a jail cell or a holding tank, did not suffer any physical abuse or bodily harm, was not touched by any police officer, and was released upon posting two bonds, one for each warrant (Plaintiff's Exhibits 1 and 2).

The decision to issue an arrest warrant was not prompted by White, Walters, or any other official of Seabrook, but was the independant

decision of Judge Pirtle.

On July 18, 1980, after leaving the Seabrook Police Station, Jureczki proceeded to a neighborhood establishment where he met the proprietor, Warren Jameson ("Jameson"). Subsequently, Jureczki and Jameson proceeded to Jureczki's home and then to the Seabrook City Hall, where they met with White. At the July 18, 1980, meeting, Jureczki testified that he was told by White that every day that the building that was erected on the weekend of July 12 and 13 stayed in its present location "it would cost him a violation," because it was a violation to build without a building permit. Jureczki was advised at that time and understood that he needed to obtain a building permit from Seabrook prior to erecting any structure as a sun barrier and that the offending structure would have to be removed as soon as possible. Jureczki proceeded to secure a building permit. On the day of his arrest, Jureczki filled in a building permit application

which White rejected as incomplete. Jureczki proceeded to prepare a second application on Monday, July 21, 1980. Jureczki retained counsel who assisted him in the preparation of a second building application. This permit was rejected.

After several attempts to obtain approval of his application, Jureczki produced adequate plans, drawings and specifications, and White issued a permit on Friday, July 25, 1980. The terms of this permit allowed Jureczki to erect or to construct a structure similar to what he had previously erected over the weekend of July 12 and 13 by adding an additional rafter, changing the thatched roof to a corrugated tin roof, relocating the offending structure, and complying with the Building Code. Jureczki knew that the building permit issued on July 25, 1980, did not involve the building constructed on the weekend of July 12 and 13. In fact, White testified that he told Jureczki to remove the offending

structure by July 30, 1980, or another complaint would be filed. White's testimony was corroborated by Walters who was present at the July 25, 1980, meeting.

When the offending structure had not been removed by July 30, 1980, another complaint was signed by White on July 31, 1980, and another warrant of arrest was signed by Judge Pirtle on complaint No. 80-1421. White met with Walters on July 31, 1980, concerning the filing of a complaint and both felt that Jureczki had not complied with the request to remove the offending structure within a reasonable time and that since each and every day the offending structure continued in the location originally erected was a continuing violation, another complaint was appropriate. On July 31, 1980, the arrest warrant was delivered to the Seabrook Police Department together with the complaint No. 80-1421 and the arrest warrant was served at approximately 8:30 p.m. by Officer Michael P. Nolan. At the

time of the service of the second arrest warrant Jureczki, his customers and family were at canopy covered tables on a boardwalk in front of the Shrimp Hut. p. 61, Vol. 1. Jureczki was handcuffed, taken into custody and transported to the Seabrook police station where he was fingerprinted, photographed and booked (Plaintiff's Exhibit 26). Jureczki was held in custody for approximately one hour. After posting bond (Plaintiff's Exhibit 3), Jureczki was released from custody.

Neither White nor Walters discussed the Jureczki matter with any other official of Seabrook concerning the filing of the third complaint or discussed with Judge Pirtle, or any police officers, or other employees of Seabrook, the fact that an arrest warrant could be issued on the third complaint filed against Jureczki.

Jureczki alleges that he was denied liberty without due process of law on the ground that he was arrested in violation of Ordinance No. 78-12.

Jureczki premises his argument on § 2.01 of Ordinance 78-12 which by its terms adopts the provisions of the Southern Standard Building Code, 1976 edition ("Standard Building Code"). First Jureczki argues that he was denied due process because under § 103.2 of the Standard Building Code, the Building Official of Seabrook is required to give notice of a building violation to any person who performs work in violation of Ordinance 78-12. Ordinance 78-12 requires that the notice must state the nature of the violation. Jureczki argues that the building official must not only give notice for any violation of obiter dictum, noted that "(t)here is authority for the proposition that a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest

injustice." Id. at 836.

In City of Dallas v. Gaechter, 524 S.W.2d 400 (Tex.Civ.App.--Dallas 1975, writ dism.), the Dallas Court of Civil Appeals held that the City of Dallas was not estopped from seeking lowering or removal of an advertising sign erected in violation of the City's airport zoning ordinance by the fact that the City Building Inspection Department had initially issued a permit to erect that sign. Ordinance 78-12 provides that permits are necessary for all buildings and structures and provides a penal provision stating that any person who violated any provision of the ordinance would be guilty of a misdemeanor subject to a fine. Those provisions are sufficient to advise anyone of ordinary intelligence that a person who engages in the conduct that was not permitted will be guilty of an offense. Goode v. City of Dallas, 554 S.W. 2d 753 (Tex.Civ.App.--Dallas 1977, no writ).

Plaintiff's constitutional due process right "does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law". Baker v. McCollan, 443 U.S. 137 (1979). Procedural due process requirements serve two purposes: they protect the individual against erroneous deprivations of liberty by the state, Fuentes v. Shevin, 407 U.S. 67, 81 (1972), and they provide the individual with the sense that the state is treating him in a fair manner, Joint Anti-Fascist Committee v. McGrath, 541 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). The fundamental requirement of procedureal due process is that the individual must be provided with the opportunity to be heard at a meaningful time and in a meaningful manner. See Parratt v. Taylor, 451 U.S. 527, 540 (1981).

"An arrest under warrant is not a violation of due process; it is due process." Dobbs v. Huff, 446 F.Supp. 35, 39 (N.D. Ga. 1977). In

Rodriquez v. Ritchey, 539 F.2d 394 (5th Cir. 1976), cert. denied, 434 U.S. 1047 (1978), suit was brought pursuant to §§ 1983. The Court of Appeals for the Fifth Circuit held that arrest pursuant to a valid warrant immunizes the arresting officer for false arrest, and, in effect, denies any constitutional deprivation when arrest is pursuant to a valid warrant. Plaintiff does not contend that the warrant was invalid or that no probable cause existed for the issuance of the arrest warrant. As the evidence adduced at trial indicates, the warrant was issued by Judge Pirtle pursuant to a validly issued complaint sworn to by Building Inspector White. Judge Pirtle made an independent judical determination of probable cause prior to issuance of the warrant and arrest. See, Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

Jureczki argues that he was denied equal protection under the Fourteenth Amendment because he is the only person who, for violation of the Ordinance, has been arrested without notice and

an opportunity to cure. Although at first blush it appears that Jureczki was not treated in a manner similar to other violators of the Ordinance, a close examination of the evidence indicates that prior to Judge Pritle, the municipal judge for Seabrook did not issue a warrant of arrest until after the person was contacted. Judge Pirtle assumed the bench in April, 1980. In July of that year he was presented with a complaint from the Building Official that Plaintiff failed to obtain a building permit. Based on this complaint, and in the exercise of independent judical discretion he issued an arrest warrant for Jureczki. There is less than a scintilla of evidence, other than Plaintiff's conjecture, that would establish the inference of a conspiracy on the part of White or Walters and Judge Pirtle. Plaintiff just had the misfortune of having a new judge who acted within his appropriate powers.

Defendants have asserted various theories

of absolute immunity and qualified immunity from the claims asserted by Jureczki. The basic facts concerning this case are undisputed and show that none of the Defendants, except White, either personally knew or had ever met the Plaintiff Jureczki prior to July 18, 1980.

Plaintiff has alleged that Judge Pirtle should be held liable for his consipracy with the other Defendants to deny him his procedural due process of law. It is clear from the evidence that Judge Pirtle had no contact with any of the other Defendants and made the decision to issue the warrant of arrest by himself without the intervention of any of the other Defendants or employees of the City of Seabrook and based upon his authority as he understood it under TEX.CODE CRIM.PRO.ANN. art 2.09 (Vernon Supp. 1982-83) and art. 15.03 (Vernon 1977). It is well settled that a judge acting in his judical capacity is cloaked with absolute immunity from §§ 1983 damages actions. Dennis v. Sparks, 449 U.S. 24, 31 (1980),

Stump v. Sparkman, 435 U.S. 349, 356 (1978); Pierson v. Ray, 386 U.S. 547 (1967). "The relevant... fact is determining whether an act by a judge is a 'judicial'one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judical capacity." Stump v. Sparkman, 435 U.S. at 362.

There has been no challenge to the fact that Judge Pirtle acted upon a proper complaint showing probable cause against the then Defendant Frank Jureczki in issuing an arrest warrant which appears valid on its face. Accordingly, even assuming, arguendo, that Jureczki's allegation of conspiracy is true, Judge Pirtle is immune from damages. Dennis v. Sparks, 449 U.S. at 28. Therefore, Judge Pirtle is immune from any damages claimed by Plaintiff.

Jureczki brings this action against Kerber in his official capacity as Chief of Police for

Seabrook. Since Jureczki is not claiming that Kerber participated in the alleged conspiracy, he has failed to prove or state a claim against the Defendant Bill Kerber. McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977). Further, even if Defendant Kerber had been the arresting officer, he would not be liable for any violation of due process. The law is plain that an officer who arrests someone pursuant to a facially valid arrest warrant has no liability for false arrest even though the suspect is later proved innocent. Perry v. Jones, 506 F.2d 778 (5th Cir. 1975). It has been held that judicial immunity extends to those who carry out the orders of judges, such as arrest warrants. Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980); Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980). Sheriffs and their deputies, as well as constables and marshals, have been held immune when serving process at the direction of the court, so long as the writ of process appeared valid on its face,

even though in fact, it was invalid. Brothers Distributing Company v. Heidtmann, 354 F. Supp. 203 (S.D. Fla. 1973), aff'd, 480 F.2d 922 (5th Cir. 1973).

Jureczki sued White and Walters individually and in their official capacity. The evidence shows that White had contact with Jureczki concerning the need for a building permit. It is disputed between Plaintiff Jureczki and Defendant White whether or not he stated a building permit would be needed for the structure erected on the weekend of July 12 and 13. After observing the structure, the Defendant Curtis White decided to file a complaint for two days of violation in the Municipal Court of Seabrook. Before filing the complaint, he met with Walters to advise him of his decision and to see if he was in accord with the filing of the complaints. A perfunctory meeting occurred between the two, at which time the Defendant Walters indicated his approval of the filing of the complaints.

The evidence clearly indicated that White believed that the Comprehensive Zoning Ordinance of the City of Seabrook did not require notice and swore out the complaints against the Plaintiff Jureczki without any written notice. Contrary to the conspiratorial claims of the Plaintiff, it is clear that White has established his good faith belief in the correctness of his action by having gone to his superior, Walters, to advise of the actions that he desired to take and obtain approval from the City Manager. See Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 (1978). Further, if Defendant White and Defendant Walters are mistaken as to what Section 103.2 of the Standard Building Code means, it is a mistake of law such as does not impose liability under § 1983. Benson v. Hightower, 633 F.2d 869 (9th Cir. 1980). The intervention of a magistrate or other judical authority between Defendant White's and Defendant Walters' actions and Jureczki's arrest insulates Defendant White and Defendant

Walters from liability in their individual capacities. Rodriquez v. Richey, 556 F.2d 1185 (5th Cir. 1977), cert. denied, 434 U.S. 1047 (1978).

While it is clear that executive personnel acting under "color of law" do not have absolute immunity, they are entitled to qualified immunity. Harlow v. Fitzgerald, _____U.S._____, 102 S.Ct. 2727, 2738 n. 30 (1980) citing Butz v. Economon, 438 U.S. 478 (1978). Under Harlow, the inquiry to determine qualified immunity is the objective one of whether the law was clear as to the constitutional right allegedly deprived Plaintiff. Id. at.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FRANK JURECZKI,

Plaintiff,

V.

CRUTIS WHITE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BUILDING INSPECTOR OF THE CITY OF SEABROOK, TEXAS; JUDGE JOE M. PIRTLE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MUNICIPAL JUDGE FOR THE CITY OF SEABROOK, TEXAS; STEVEN WALTERS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF SEABROOK, TEXAS; BILL KERBER, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CITY OF SEABROOK, TEXAS; JOHN DOES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES FOR THE CITY OF SEABROOK, TEXAS; AND THE CITY OF SEABROOK, TEXAS,

Defendants.

CIVIL ACTION NO. H-80-1742

Consolidated with H-82-2000

FINAL JUDGMENT

This action came on for trial before the Court and a jury and the issues having been duly tried and a decision duly rendered,

It is ORDERED and ADJUDGED that Plaintiff, Frank Jureczki, take nothing, that the action be

DISMISSED on the merits and that Defendants recover of Plaintiff their costs of action.

DONE at Houston, Texas, this 10 day of April, 1983.

/s/ Ross N. Sterling
United States District Judge

ERRATA

ERRATA

p. vii		Correct citation is R. Freilich & R. Carlisle, Sword & Shield, 435 (1983)
p. 12	l.8	Insert the word "violation" at the end of the sentence.

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK JURECZKI,
Petitioner,

v.

THE CITY OF SEABROOK, TEXAS; CURTIS WHITE; JUDGE JOE PIRTLE; STEVEN WALTERS; AND BILL KERBER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Court of Appeals correctly held that, even if a Building Inspector acts with malice in filing a complaint with the clerk of a Municipal Court, if there exists probable cause at the time for the Municipal Judge to issue a warrant of arrest, the arrest is constitutional.

II. Whether the United States District Court and the Fifth Circuit Court of Appeals violated Petitioner's seventh amendment right to trial by jury by granting a Motion for Directed Verdict.

III. Whether the alleged single deviation by a City Building Inspector of an alleged policy or custom imposes liability upon the municipality under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF AUTHORITIES	III
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	5
I. The petition should be denied because the Fifth Circuit Court of Appeals correctly held that, even if a Building Inspector acts with malice in filing a complaint with the clerk of a Municipal Court, if there exists probable cause at the time for the Municipal Judge to issue a warrant of arrest, the arrest is constitutional	7
II. The record does not support Petitioner's claim that the District Court and the Fifth Circuit violated his seventh amendment right to trial by jury	10
III. An alleged single unlawful act by a city building inspector of an alleged policy or custom does not impose municipal liability under the decision in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978)	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES

	Page
Adams v. Wainwright, 445 F.2d 832 (5th Cir. 1971), *cert. denied*, 404 U.S. 860 (1971)	11
Adickes v. S. H. Kress & Company, 398 U.S. 144, 167, 90 S. Ct. 1598, 1613 (1970)	10, 13
Baker v. McCollum, 443 U.S. 137, 99 S. Ct. 2689, 2692 (1979)	12
Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187 (5th Cir. 1978)	10
Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984)	11, 13, 14
City of Dallas v. Gaechter, 524 S.W.2d 400 (Tex. Civ. App.—Dallas 1975, writ dism'd)	8
Cook, et al v. Houston Post, 616 F.2d 791 (5th Cir. 1980)	10
Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975)	11
Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981)	9
Jureczki v. City of Seabrook, 760 F.2d 666 (5th Cir. 1985)	5, 9, 14
Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 701 (1979)	11
Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978)	12, 13
Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961)	12
Oklahoma City v. Tuttle, ____U.S.____, 105 S. Ct. 2427, 2436 (1985)	13
Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981)	9, 10
Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir. 1982), *cert. denied*, 459 U.S. 1137, 103 S. Ct. 772 (1982)	9
U.S. ex. rel. Hayward v. Johnson, 508 F.2d 322 (3rd Cir. 1975), *cert. denied*, 422 U.S. 1011 (1975)	11

UNITED STATES STATUTES

42 U.S.C. Section 1983	6, 10, 13

MISCELLANEOUS

C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, Section 22A, at 122 (4th ed. 1983)	10

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Frank Jureczki ("Jureczki"), invoking 42 U.S.C. Section 1983 (1976), brought this action seeking damages and injunctive relief from the City of Seabrook,

Texas ("Seabrook"), its City Manager Steven Walters ("Walters"), Chief of Police Bill Kerber ("Kerber"), former Building Inspector Curtis White ("White") and Municipal Judge Joe M. Pirtle ("Pirtle"), for alleged violations of Petitioner's constitutional rights through the enforcement of the Seabrook Zoning Ordinance. The case was tried to the Court and a jury and upon the close of Petitioner's evidence Respondents' Motion for Directed Verdict was granted. (Appendix to Petition for Writ of Certiorari, at A16-A36)

Seabrook is a home-rule city located principally within Harris County, Texas. White served as the Building Inspector for Seabrook from July 19, 1977, until his retirement on September 3, 1981. Kerber has been the Chief of Police for Seabrook since February 16, 1979.

Jureczki is the owner of a restaurant known as The Shrimp Hut located in Seabrook and is a full time shrimper and restaurateur. In early June, 1980, Jureczki decided to expand his restaurant by constructing a "sun barrier" over approximately 10 outdoor picnic tables which were placed adjacent to the main building on a grated area. Jureczki and White met in June of 1980 to discuss the new addition. White and Jureczki differ as to the substance and detail of the discussion concerning the possibility of various structures discussed to provide shade over the picnic tables at The Shrimp Hut. White testified that he told Jureczki that he would need a building permit. Jureczki testified that White told him no permit was needed.

The sun barrier was erected over the weekend of July 12 and 13, 1980, by Jureczki and his son. The structure was approximately 36 feet long by 24 feet wide and was

supported by approximately ten 7 inch by 10 inch creosote pilings and had a flammable thatched roof. White did not discover the sun barrier until after he came to work on Monday, July 14, 1980, when he observed that the thatched roof structure was substantially in place and noted that a building permit had not been issued for the structure, which was a violation of the City of Seabrook Comprehensive Zoning Ordinance No. 78-12. White testified that he made several unsuccessful attempts by phone and personal visit to The Shrimp Hut to contact Jureczki regarding building a structure without a building permit.

On or about July 17, 1980, White filed complaints against Jureczki for violating the Zoning Ordinance of Seabrook in failing to obtain a building permit prior to construction. White met with City Manager Walters on July 17, 1980, and discussed with him the filing of the complaints against Jureczki. Walters concurred in the decision to file the complaints. On July 17, 1980, Judge Pirtle signed two warrants of arrest and those warrants were delivered to the Seabrook Police Department and were acted upon on July 18 when the two arrest warrants were served on Jureczki at his residence in Seabrook. The officer knocked on Jureczki's door, did not forcibly enter Jureczki's home, and announced that he was placing Mr. Jureczki under arrest pursuant to the arrest warrants. Jureczki's wife was allowed to get Jureczki a pair of shoes and a shirt to complete his dressing and the police did not perform any type of search of his person or home. Jureczki was not handcuffed and no guns or pistols were drawn by the police officers. In fact, Jureczki was allowed to drive his own car to the police station and no police officer rode with him in his car. Jureczki was not placed

in a jail cell or holding tank, did not suffer any physical abuse or bodily harm, was not touched by any police officer, and was released upon posting bond.

The decision to issue an arrest warrant was not prompted by White, Walters, or any other official of Seabrook, but was the independent decision of Judge Pirtle.

Jureczki met with White again and was advised that every day the building erected on the weekend of July 12 and 13 stayed in its present location could result in another complaint being filed against him. While Jureczki finally obtained a building permit, the terms of this permit allowed Jureczki to erect or construct a structure similar to what he had previously erected by adding an additional rafter, changing the thatched roof to a corrugated tin roof, relocating the offending structure, and complying with the Building Code. Jureczki knew that the building permit issued on July 25, 1980, did not involve the building constructed on the weekend of July 12 and 13. Since the offending structure was still in place on July 31, 1980, another complaint was filed by White and another warrant of arrest was signed by Judge Joe Pirtle for that complaint. Again, White met with Walters on July 31, 1980, concerning the filing of a complaint and both felt that Jureczki had not complied with the request to remove the offending structure within a reasonable time and that since each and every day the offending structure continued in the location originally erected was a continuing violation, another complaint was appropriate. On July 31, 1980, Judge Pirtle independently issued another arrest warrant after the complaint was filed by White. The arrest warrant was delivered to the Seabrook Police Department and Jureczki was arrested. Jureczki was hand-

cuffed, taken into custody and transported to the Seabrook Police Station where he was fingerprinted, photographed and booked. Jureczki was held in custody for approximately one hour. After posting bond, Jureczki was released from custody.

Neither White nor Walters discussed the Jureczki matter with any other official of Seabrook concerning the filing of the third complaint or discussed with Judge Pirtle, or any police officers or other employees of Seabrook, the fact that an arrest warrant could be issued on the third complaint filed against Jureczki. Jureczki has never argued that any of the warrants of arrest were invalid, or that no probable cause for arrest existed.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Southern District of Texas granting the Respondents' Motion for Directed Verdict at the close of the evidence presented by Petitioner Frank Jureczki in the five day trial conducted in Houston, Texas. *Jureczki v. City of Seabrook*, 760 F.2d 666 (5th Cir. 1985). The United States Court of Appeals for the Fifth Circuit denied Petitioner Jureczki's Motion for Rehearing and Motion for Rehearing en Banc.

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner do not warrant this Court's attention. Failure to obtain a building permit is a violation of the Zoning Ordinance of Seabrook. Such violations are routinely brought to municipal court as a misdemeanor upon the filing of a valid complaint. No attack has ever been made upon the validity of the com-

plaint filed against Jureczki by White. Even if there was a misunderstanding between White and Jureczki as to the need for a building permit, such does not prevent White from filing a complaint containing his version of the facts and is not a constitutional deprivation of any due process right guaranteed under the United States or Texas Constitution. A judge's independent determination of probable cause breaks the chain of causation and insulates the initiating party from liability under 42 U.S.C. Section 1983.

The District Court's decision to grant a Motion for Directed Verdict was proper in that the Court reviewed the evidence drawing all reasonable inferences in light most favorable to Jureczki and concluded that reasonable men and women in the exercise of impartial judgment could not arrive at contrary results in deciding that Jureczki was denied neither due process nor equal protection since the complaint filed against him was accurate and contained no material omissions and constituted probable cause for an arrest.

While the City Building Official for Seabrook is delegated the responsibility to enforce the Zoning Ordinance for the City, those decisions can be reviewed by a Board of Adjustment or the City Council, and the remedies available to enforce the ordinance by the Building Official are left to his discretion. Jureczki failed to establish by appropriate evidence any policy or custom of Seabrook that unlawfully deprived him of constitutionally protected rights and therefore imposed municipal liability on Seabrook.

I.

The petition should be denied because the Fifth Circuit Court of Appeals correctly held that, even if a Building Inspector acts with malice in filing a complaint with the clerk of a Municipal Court, if there exists probable cause at the time for the Municipal Judge to issue a warrant of arrest, the arrest is constitutional.

Petitioner has requested this Court to assume various facts which were not proved by any evidence in the record brought to this Court. The truth is Petitioner Jureczki did not fully describe the structure that he wanted to build and he so admitted. This Court should not assume that White acted maliciously absent proof by Petitioner of that fact. The assumptions asserted by Petitioner in his brief ignores the factual dispute between the parties as to what White told Jureczki was needed with respect to obtaining a building permit at the probable cause stage. The argument presented by Jureczki that because White told him no permit was required thereby causes a wrongful filing of a complaint that is protected under the United States Constitution due process clause is simply untenable and unfounded at the probable cause stage in both fact and law. Assuming Jureczki is correct that there was a misunderstanding between he and White, the alleged statement that White told him that no building permit was required is merely a defense that he could assert in the criminal prosecution. White consistently denied that he ever told Jureczki no permit was needed. The Building Official of Seabrook, as well as any other aggrieved party, has the right to file a complaint with the clerk of the Municipal Court of Seabrook alleging a violation as he believes it to be of the Zoning Ordinance

by any other individual, including Jureczki, for erecting a structure prior to obtaining a building permit. That is the only action White took. White swore out a complaint alleging that Jureczki erected a structure prior to obtaining a building permit to do so. There is no evidence that Walters was ever informed by White or anyone else that Jureczki was told that no building permit was required for the unlawful structure erected by Jureczki. The argument put forward by Jureczki that he was told by White that he did not need a building permit does not raise the defense of estoppel under the laws of the State of Texas. The case of *City of Dallas v. Gaechter,* 524 S.W.2d 400 (Tex. Civ. App.—Dallas 1975, writ dism'd), held that the City of Dallas was not estopped from seeking lowering or removing of an advertising sign erected in violation of the City's Airport Zoning Ordinance by the fact that the City Building Inspection Department had initially issued a permit to erect that sign. Jureczki argues that White should have disclosed in the complaint that Jureczki was told that no permit was needed since that is what Jureczki testified occurred. While this Court and the Courts below should consider the evidence in the light most favorable to Jureczki in testing the Motion for Directed Verdict, White testified consistently that he never told Jureczki no permit was needed. How can Jureczki argue then that a fact which White denies occurred should have been disclosed in the municipal complaint that was filed? The point is not that the District Court has made a factual determination whether or not such statement was made by White but that White denies that it occurred. White's denial should be viewed only in a determination of probable cause for filing the criminal complaint against Jureczki. While the argument of Jureczki denies fair play between White and Jureczki,

there is no evidence that any other Seabrook official was aware of the alleged conversation that no permit was required. Certainly the building official, who was provided only an oral description of what was to be erected, and then discovers that such erection is in fact, *in his belief*, in violation of the Zoning Ordinance and therefore does require a permit, will not be estopped or prohibited from proceeding against an individual to compel obtaining a building permit through any appropriate means of enforcement. White's malice, which the Court of Appeals for the Fifth Circuit assumed for the purposes of the appeal, is irrelevant in obtaining a warrant where probable cause exists. *Jureczki v. City of Seabrook*, 760 F.2d 666, 668 (5th Cir. 1985); *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981). A judge's determination of probable cause breaks the chain of causation and insulates the initiating party from liability. *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982) cert. denied, 459 U.S. 1137, 103 S. Ct. 772 (1982).

Jureczki's argument would allow the assertion of a civil rights claim any time the complaining party's statement is disputed. White's complaint initiated the legal proceedings to bring Jureczki before the Municipal Court of the City of Seabrook. It was the independent decision of Judge Pirtle under the laws of the State of Texas to issue the warrant of arrest and not at the decision or request of the building official White. Jureczki may have a claim against White for a tort cognizable under the common law of Texas but has failed to prove by evidence sufficient to go before a jury that any of his constitutionally protected rights were violated by the filing of a complaint by White or the issuance of an arrest warrant by Judge Pirtle. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct.

1908 (1981); *Cook, et al v. Houston Post,* 616 F.2d 791 (5th Cir. 1980); *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187 (5th Cir. 1978).

II.

The record does not support Petitioner's claim that the District Court and the Fifth Circuit violated his seventh amendment right to trial by jury.

Jureczki's argument that he has been denied his right to trial by jury stems from his alleged violation of his right to equal protection of the laws. His equal protection of the law claim stems from his assertion that White failed to follow his alleged custom of first warning a violator of the possibility of summons or arrest and then allowing the violator to correct the deficiencies. Jureczki wholly failed in his evidence to establish that White had such a custom or usage to be held liable under Section 1983. As Professor Wright has so succinctly stated in his text on the law of federal courts,

> "For a person to be liable under Section 1983 he must have acted under color of state law, or, in the more precise statutory term, 'under color of any statute, ordinance, regulation, custom or usage' of a state, territory, or the District of Columbia. It has been held that 'custom, or usage' requires state involvement and is not simply a practice that reflects long-standing social habits, generally observed by the people in a locality. The custom or usage 'must have the force of law by virtue of the persistent practices of state officials.' " C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, Section 22A, at 122 (4th ed. 1983), citing *Adickes v. S. H. Kress & Company,* 398 U.S. 144, 167, 90 S. Ct. 1598, 1613 (1970).

Can a building official establish by a "custom" a constitutionally protected due process right to an additional notice prior to the filing of a complaint with the Municipal Court? Jureczki merely asserts a procedural defect. Jureczki has proven no deprivation of some right previously held under federal law and, thus, there is no entitlement to due process protection of the procedure prescribed by the ordinance. *Leis v. Flynt,* 439 U.S. 438, 99 S. Ct. 698, 701 (1979); *Adams v. Wainwright,* 445 F.2d 832 (5th Cir. 1971), cert. denied, 404 U.S. 860 (1971); *U. S. ex rel. Hayward v. Johnson,* 508 F.2d 322 (3rd Cir. 1975), cert. denied, 422 U.S. 1011 (1975); *Hamilton v. Chaffin,* 506 F.2d 904 (5th Cir. 1975). While Respondents assert that Jureczki has failed to establish by any evidence such a custom of giving notice by White, if notice was the custom or policy of the City, then it was only White who failed to follow such policy. Jureczki failed to prove that it was a custom. Can a custom be established when a statute, ordinance, regulation, or guideline gives the building inspector the discretion to use different means for a given situation in enforcing a zoning ordinance? *Bennett v. City of Slidell,* 728 F.2d 762, 768 (5th Cir. 1984). The evidence clearly shows that Jureczki had dealings with White since moving to Seabrook in 1976. In 1977, five complaints were filed against Jureczki by White. No evidence was produced by Jureczki to show he received written notice prior to filing of those complaints. In February of 1980, Jureczki commenced construction of a garage prior to obtaining a building permit to do so. White informed Jureczki that he had to obtain a building permit immediately and paid twice the permit fee as a penalty for having started construction without a permit. Is there a constitutional impediment forbidding the building official

the discretion to proceed by different lawful means that he deems appropriate for each individual or in each factual situation that he confronts? Jureczki has not been deprived of a right secured by the Constitution and laws. *Baker v. McCollum,* 443 U.S. 137, 99 S. Ct. 2689, 2692 (1979). Jureczki's constitutional due process right "does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished—without due process of law." *Baker v. McCollum,* supra at 2695.

III.

An alleged single unlawful act by a city building inspector of an alleged policy or custom does not impose municipal liability under the decision in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978).

The defendant in a Section 1983 action must be a "person," and this has been construed as a term of art. In *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473 (1961), this court first held, on the basis of the 1871 enactment, that a municipal corporation is not a "person" in this sense. In 1978, however, in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978), this Court re-examined the legislative history of the 1871 law, and concluded that its previous reading of that history had been erroneous.

Under *Monell* a local government can be sued for monetary, declaratory, or injunctive relief, but only if the action that is alleged to be unconstitutional implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the officers of the corporation or has been taken "pursuant to

governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell v. Department of Social Services, supra,* 436 U.S. at 690-691, 98 S. Ct. at 2036. A municipality "cannot be held liable solely because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory." *Monell v. Department of Social Services,* supra, 436 U.S. at 691, 98 S. Ct. at 2036. The custom or usage "must have the force of law by virtue of the persistent practices of state officials" and is not simply a practice that reflects long-standing social habits, generally observed by the people in the locality. *Adickes v. S. H. Kress & Company,* supra. Jureczki's attempt to show that an alleged isolated unlawful act by White binds Seabrook is a hollow attempt to get to the deep pockets of the City. The alleged single unlawful act has never been proved to be a custom or policy of the City of Seabrook. The single unlawful act, if there in fact was one, must be that White *failed* to notify Jureczki prior to filing a complaint in the Municipal Court of the City of Seabrook that he was going to do so. If Jureczki is alleging that the custom or usage was for White to notify alleged violators prior to filing a complaint, then the custom or usage is not what Jureczki is complaining about. His complaint is the failure of White to follow such custom or usage, not the custom or usage itself. A single discrete decision to do something will not cause 1983 liability, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy or custom, which policy or custom can be attributed to a municipal policymaker. *Oklahoma City v. Tuttle,* ____U.S.____, 105 S. Ct. 2427, 2436 (1985); *Bennett*

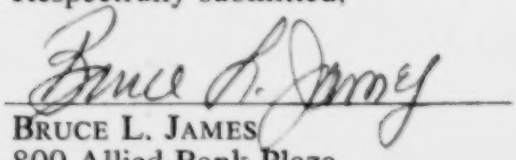
v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984). Jureczki offered no such proof.

As the Court of Appeals for the Fifth Circuit noted, Jureczki may or may not have been treated unfairly, but five days of trial testimony show that he was denied neither due process nor equal protection. The complaint was accurate and contained no material omissions. It constituted probable cause for an arrest. Testimony at trial, read in whatever light, failed to establish a sufficient factual basis of disparate treatment to substantiate an equal protection violation. This Court should not disturb that determination. *Jureczki v. City of Seabrook*, supra at 670.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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January 17, 1986

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the aforegoing Respondents' Brief in Opposition have been served on all parties required to be served by serving opposing counsel, Joel Reinfeld, 191 Main Street, P. O. Box 613, Hackensack, New Jersey 07602, by certified, first class United States mail, postage prepaid, return receipt requested, all in accordance with Rule 28.3 of the Supreme Court of the United States, on the 31st day of January, 1986.

Bruce L. James

BRUCE L. JAMES